HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 59-09

DECISION

IN THE MATTER OF THE APPEAL OF:

PAUL J. LUCERO
Appellant,

vs.

DEPARTMENT OF AVIATION
and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, Paul Lucero, appeals his disqualification from the Department of Aviation, Field Maintenance Division (the Agency), on July 14, 2009. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on December 1, 2009. The Agency was represented by Robert A. Wolf, Assistant City Attorney. The Appellant represented himself. Agency Exhibit 1 page 3 was withdrawn after objection, while the remainder of Agency exhibits 1-7 were admitted without objection. Ronald Morin and Dan Brown testified for the Agency, while the Appellant testified on his own behalf, with no other witnesses presented. For reasons which follow, the disqualification is AFFIRMED.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant was properly disqualified under the Career Service Rules (CSR); and

B. whether, in disqualifying the Appellant, the Agency engaged in unlawful discrimination based upon the Appellant's race, gender, or ethnicity.

III. FINDINGS

Lucero was a Career Service employee who worked as an Operations Supervisor for the Agency. He supervised and worked with a crew of 13 tending to repairs, maintenance, and emergency response over the entire 53 square miles of Denver

International Airport. [Exhibit 4-11; Morin testimony; Brown testimony]. Among his various duties, Lucero led a snow removal crew to clear runways and taxiways, and directed his crew in the maintenance of airways, new construction, repair and maintenance of the entire airport facility, including parking lots and buildings. Lucero spent 70% of his time in the field with his crew in order to supervise their performance.

All employees in the Field Maintenance Division, including operations supervisors, are required to maintain valid drivers' licenses. In addition, Lucero was required to wear a red-striped badge showing he had authority to operate a vehicle for his airside[1] supervisory duties. Only one other employee in the Field Maintenance Division had such a badge. Because Lucero directed maintenance, repair, and emergency response activities over the entire airport, and because he could be called to various locations during the day on short notice, maintaining a valid drivers' license was an essential criterion of his position. [Morin testimony; Brown testimony; Exhibit 3-5, 3-6; Exhibit 5-1]. The Field Maintenance Division maintains a zero-tolerance policy against the loss of drivers' license privileges. [Morin, Brown testimony].

On March 10, 2009, Lucero was cited for driving under the influence of alcohol or drugs, his second violation of the Colorado's DUI law. [Exhibit 7-1]. He notified his supervisor. Since he was issued a provisional license at that time, he was allowed to continue his duties. In the related DMV hearing on June 3, 2009, his license was revoked for one year. [Exhibit 6-1]. That same day, when he notified his supervisor, Morin, about the revocation, he was immediately relieved of duty. [Morin testimony].

Morin issued a letter to Lucero, in contemplation of disqualification, on June 24, 2009. A pre-disqualification meeting was held on July 9, 2009, attended by Lucero, Morin, and Brown. At the meeting, Lucero stated he was authorized by DMV to acquire an interlock device which would permit him to drive with a restricted license. The Appellant produced no documentation, either at the pre-disciplinary meeting or at his appeal hearing, which showed such DMV authorization of the interlock device, nor did he show a restricted license.

The Agency disqualified Lucero on July 14, 2009. [Exhibit 1-1]. This appeal was filed timely on July 29, 2009.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A. 1. d., as the direct appeal of a disqualification. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

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[1] Secured portions of DIA are known as "airside" while non-secured areas are deemed "landside."

B. Burden and Standard of Proof

This case contains a mixed burden of proof. The Agency retains the burden of persuasion, throughout the case, to prove disqualification was proper under the Career Service rules. The Appellant retains the burden of persuasion, throughout the case, to prove the Agency engaged in unlawful discrimination. The standard by which the moving party must prove its claims is by a preponderance of the evidence.

C. CSR 14-20 Disqualification

The Career Service Rules require the disqualification of an employee who becomes unable to perform satisfactorily the essential functions of his position due to a legal impairment. CSR 14-21. The preponderance of the evidence proved it was an essential function of Lucero's position to maintain a valid driver's license. [Exhibit 5-1; Brown testimony; Morin testimony]. Lucero acknowledged his driver's license was revoked on June 3, 2009. The Agency therefore established the elements of disqualification. Lucero presented the following proposals and contentions in mitigation or opposition to disqualification.

1. Inequitable treatment. Lucero's principle contention is one or more other DIA employees have been allowed to retain their jobs following a license revocation. When questioned about the only employee named by Lucero who allegedly retained her job despite a license revocation, Brown did not recall such an occurrence, the employee did not testify, and no other evidence corroborated Lucero's assertion. Morin and Brown countered with equal credibility that no employee in the Field Maintenance Division has ever been allowed to continue working following a license revocation. Consequently, this assertion by the Appellant was not proven by a preponderance of the evidence.

2. Interlock. Lucero testified he told Morin, at his pre-disciplinary meeting, that he (Lucero) offered to pay for the installation of an interlock device on the Agency vehicle he drove, since the DMV permitted such an arrangement. First, neither Morin nor Brown, recalled Lucero talking about an interlock device at his pre-disciplinary meeting. [Morin cross-exam; Brown cross-exam]. Second, the Agency is under no obligation to accept the installation of an interlock device on its vehicles. Third, Brown credibly testified he was unaware of any such precedent at the Agency, and would not permit such an arrangement because of unknown costs to the Agency, the risk of liability, and because the Field Maintenance Division insists on a zero-tolerance policy for the loss of driver's license privileges. [Brown cross-exam]. Finally, as noted by the Agency, Lucero not only failed to produce proof of a restricted license or authorization for an interlock device at his pre-disciplinary hearing, but at his hearing over four months later, Lucero still produced no such DMV authorization, lending doubt as to its existence. Lucero's interlock claim was not sustained by the evidence.

3. Alternative assignment. Lucero suggested he could be reassigned to a position that does not require driving. Morin replied the Field Maintenance Division is already understaffed, so there is no room for an operations supervisor who cannot drive, since, for reasons stated above, supervisors must drive in order to supervise their crews. [Morin testimony]. In addition, Brown declared the Agency sought, but could find not find another position for which the Lucero was qualified that did not require a driver's license. [Brown testimony]. Consequently, the alternative assignment proposal fails.

4. Chauffeur. Lucero also suggested another red-badged employee could drive him to and from his assignments. Morin countered that Lucero's position required frequent driving, on short notice, to varied locations throughout the DIA campus, so that, with the Agency already short staffed by 40-60 employees, there was simply insufficient manpower to accommodate such a request. Also, in response to Lucero's proposal, Morin replied dryly but accurately, "if we had to do that why would I need you?" [Morin cross-exam]. Finally, Lucero's suggestion, that the Agency provide transportation for him, did not obligate the Agency to accommodate this request, particularly since few individuals possess the requisite red badge and could not be pulled off their respective duties to accommodate Lucero. For these reasons, Lucero's chauffeur request did not obligate the Agency to accommodate him.

D. Appellant's Discrimination Claims

Intentional discrimination is proven by evidence of 1) membership in a protected class, 2) an adverse employment action, and 3) evidence which supports an inference of discrimination. In re Johnson, CSA 135-05, 3 (Order 3/10/06). Aside from the naked assertions in his pre-hearing filings and at hearing, Lucero failed to produce any evidence whatsoever of a required component of discrimination. He did not state, nor did his filings indicate, his race or ethnicity, thus failing to establish the first element of discrimination, membership in a protected class. In addition, Lucero did not present any evidence or state what connection there may have been between the disqualification and any protected status. In his only reference to discrimination during hearing, Lucero claimed he felt discriminated against because the Agency's zero-tolerance policy for loss of license was applied unevenly. [Appellant opening statement]. However, Lucero produced no witness, document or other evidence to support his claim. Without showing some connection between an adverse agency action and a protected status, an assertion that someone else may have been treated more favorably is not a form of discrimination that is protected by discrimination law. Therefore, the Appellant's discrimination claims are dismissed for failure to state a claim for which relief may be granted.

V. ORDER

The Agency's disqualification of the Appellant from his employment on July 14, 2009, is AFFIRMED.

DONE December 15, 2009.

Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

Either party may petition the Career Service Board for review of this decision in accordance with the requirements of Career Service Rule 19-60, and sections that follow, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.